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(1)

No. 06- 06163 - 2007

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IN THE
SUPREME COURT OF THE UNITED STATES

ERIC LLOYD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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June 2007

QUESTIONS PRESENTED

1. Does the use of the United States Sentencing Guidelines as a "starting point" for sentencing comport with 18 U.S.C. § 3553(a) and the holding in United States v. Booker, 543 U.S. 220 (2005), or does it make imposition of a sentence within the guidelines range a rebuttable presumption, in violation of the Fifth and Sixth Amendents to the Constitution?

2. Should the distinction drawn in 18 U.S.C. § 3553(c) between the kind of reason that must be articulated for imposition of a within-Guidelines sentence and that for a below-Guidelines sentence require that part of § 3553(c) be severed and stricken pursuant to United States v. Booker, 543 U.S. 220 (2005), and the statute be construed to require instead that a reason be given in every case for the conclusion that the sentence selected is "not greater than necessary" under § 3553(a)?

3. At a resentencing following United States v. Booker, 543 U.S. 220 (2005), is the district court ordinarily prohibited by any applicable law or legal rule from considering post-offense or post-sentence rehabilitation?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioner Lloyd and respondent United States). Petitioner had two co-defendants in the district court, but neither has been involved in the appellate proceedings.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ERIC C. LLOYD respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit affirming the imposition of an identical Guideline sentence following a remand for reconsideration and resentencing in light of *United States v. Booker*, 543 U.S. 220 (2005).

OPINIONS BELOW

The Third Circuit's precedential Opinion (per Greenberg, J., with Sloviter and Chagares, JJ.) was filed on November 28, 2006; see *United States v. Lloyd*, 469 F.3d 319; Appx. A. In remanding the case for resentencing initially, the Third Circuit (per Alito, J.) issued an order and no opinion. Appx. B. The judgment of resentencing of the United States District Court for the District of Delaware (Jordan, U.S.D.J.[1]) was filed August 22 and entered August 23, 2005. The district court neither published nor wrote any opinion.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit affirming the the judgment of sentence imposed upon resentencing of the petitioner

[1] Judge Jordan's nomination to the Third Circuit was pending at the time of decision of this case in the court below, and has since been confirmed.

was filed and entered on November 28, 2006. A copy is attached as Appendix A. Appellant's petition for rehearing was denied by Order dated, filed and entered January 3, 2007. A copy is attached as Appendix C. By Order dated March 28, 2007, under No. 06A920, Justice Souter extended until Saturday, June 2, 2007, the time for filing a petition for a writ of certiorari in this case. This petition is being filed by postmark on the first business day following that extended due date. Rules 13.1, 13.3, 13.5. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

TEXT OF CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides, in part: "No person shall ... be deprived of ... liberty ..., without due process of law ...."

The Sixth Amendment to the United States Constitution states, in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ..., and to be informed of the nature and cause of the accusation; ... and to have the Assistance of Counsel for his defence."

With respect to the duties of the district court at sentencing, the Sentencing Reform Act of 1987 provides, in pertinent part:

> **(a) Factors to be considered in choosing a sentence.** -- The court shall impose a sentence

sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider --

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed --

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence types and the sentencing range established ... in the Guidelines ...;

(5) any pertinent policy statement [of the U.S. Sentencing Commission];

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

With respect to the articulation of reasons for a sentence, the Sentencing Reform Act provides, in pertinent part:

> **(c) Statement of reasons for imposing a sentence.** -- The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and if the sentence --
>
> (1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reasons for imposing a sentence at a particular point within the range; or
>
> (2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described ....

18 U.S.C. § 3553(c).

With respect to proceedings on remand following the reversa of a sentence, the Sentencing Reform Act provides, in pertinent part:

> **(g) Sentencing upon remand.** -- A district court to which a case is remanded pursuant to subsection (f)(1) [sentence imposed in violation of law] or (f)(2) [incorrect application of sentencing guidelines] shall resentence a defendant in accordance with section 3553

and with such instructions as may have been given by the court of appeals, except that --

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission ... and that were in effect on the date of the previous sentencing ....

(2) The court shall not impose a sentence outside the applicable guideline range except [under specified circumstances] ....

18 U.S.C. § 3742(g).

STATEMENT OF THE CASE

This petition arises from a resentencing pursuant to *United States v. Booker*, 543 U.S. 220 (2005). Over objection, the district court gave pervasive weight to the Sentencing Guidelines, treating as "prohibited" petitioner's reqest that the court consider post-offense rehabilitation. The court of appeals affirmed on the basis that the district court had merely treated the Guidelines as a "starting point" for choosing the sentence.

a. ***Procedural History***

A grand jury in the District of Delaware returned a one-count indictment on December 19, 2002, charging conspiracy in violation of 21 U.S.C. § 846, and naming petitioner Eric Lloyd, as one of two defendants.[2]

[2] The case had originated with a local arrest on February 12, 2001, and ensuing prosecution in the state courts of Delaware. A jury trial in December 2001 ended in mistrial. On the day set for retrial, November 21, 2002, the state filed a *nolle prosequi* in light of a federal complaint filed that day.

Three superseding indictments were eventually returned, the last naming petitioner in two counts and filed April 23, 2003, against three defendants. On August 11, 2003, Mr. Lloyd pleaded guilty under an agreement to Count 1sss. This count charged that from February through August 2001 petitioner and his two co-defendants conspired to possess with intent to distribute more than 500 grams of cocaine. (The plea to this count set the mandatory minimum sentence at five years, and the maximum at 40 years' imprisonment. 21 U.S.C. § 841(b)(1)(B)(ii)(II).)

Sentencing initially occurred on December 15, 2003. Judge Jordan denied petitioner a downward departure he sought. The district court then imposed sentence of 168 months' (14 years') imprisonment, to be followed by five years' supervised release, as well as the $100 special assessment. Judgment of sentence was filed and entered on December 17, 2003.

Petitioner took a timely appeal from the sentence. His opening brief was filed in November 2004. Following the announcement by the Supreme Court of its decison in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005), rather than file a brief as appellee, the government filed a motion for summary remand. The Third Circuit (per Alito, J., with McKee & Ambro, JJ.) granted the motion on March 17, 2005. Appx. B.

On remand, petitioner submitted information about his rehabilitative efforts in the Bureau of Prisons, many supporting letters attesting to his good character, and a detailed sentencing memorandum. The hearing on resentencing was held on August 2, 2005. The district court (Jordan, J.) rejected the defense arguments for a

lower, non-Guidelines sentence, on the sole basis that "the guideline range is the thing that I should be looking to primarily." CA3 1App. 11; 2App. 122.[3] The court then imposed the same sentence as originally, that is, 168 months' (14 years') imprisonment.

On appeal, petitioner challenged the district court's refusal to give weight to non-guideline factors and the inadequacy of the reason it stated for the sentence. The Third Circuit affirmed in a published opinion. Appx. A. Rehearing was denied. Appx. C.

b. ***Statement of Facts***

According to the proffered factual basis for the plea, which petitioner agreed the prosecution could prove (but did not say he agreed was true), in "early February 2001" petitioner Lloyd arranged with the two named co-defendants that they would buy kilograms of cocaine in Houston, Texas. Petitioner and a co-defendant recruited two women to carry money to Texas for the buy and then to transport the drugs back to Delaware. On or about February 4, Mr. Lloyd and a co-defendant jointly purchased "approximately three kilograms of cocaine," which the women concealed "on other persons." However, while in possession of just under three kilograms of cocaine, the couriers were arrested at the Houston Airport on February 7.[4] Working with the other co-defendant, according to the

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[3] In this Petition, "CA3 2App. *n*" refers to Volume 2 of the Appendix filed in the Third Circuit, at page *n*. "CA3 1App. *n*" refers to Volume 1 of that Appendix.

[4] This incident underlay Mr. Lloyd's initial, February 12, 2001, arrest in Delaware. PSI ¶ 31, at 8.

prosecutor, petitioner made two additional trips to Texas in June and July 2001. Finally, in August 2001, petitioner and the co-defendant returned to Texas with a courier, where they purchased five kilograms of cocaine. This time, the trip back was to be by automobile, but again (on August 9), the courier was arrested, this time in possession of 4.5 kilograms of cocaine.

Asked whether he agreed, all that petitioner admitted was true was that "I paid Erica Negron and Wheattina Goodman to go to Texas and bring back drugs from Texas ... to Delaware." CA3 2App. 71. When the unspecified "drugs" reached Delaware, petitioner was "going to distribute those, sell those to other people or have other people sell them for [him.]" *Id.* Petitioner also agreed, somewhat ambiguously, that what the prosecutor said, "is right, that they can prove it." CA3 2App. 74.

Under the plea agreement, Mr. Lloyd "stipulated" that "the total amount of cocaine that is attributable to the conspiracy charged in Count One of the indictment to which the defendant is pleading guilty is approximately 7,506 grams," and that "the conspiracy ... involved five or more participants, and that the defendant was a manager or supervisor of the conspiracy pursuant to United States Sentencing Guidelines Section 3B1.1[(b)]." These stipulations also appear in the written plea agreement. At the change of plea hearing, however, the prosecutor added that "The parties further reserve the right to contest or dispute any findings of the sentencing Court, including on appeal."

c. *Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii)* The United States District Court had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged federal offenses committed in the district. The court of appeals had jurisdiction under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

The circuits are divided on the proper methodology for a sentencing judge to implement 18 U.S.C. § 3553(a) following this Court's decision in *Booker*. This petition should be granted and remanded in light of this Court's impending decision in *Rita*.

On November 3, 2006, this Court announced the granting of two writs of certiorari in the companion cases of *Rita v. United States*, No. 06-5754, and *Claiborne v. United States*, No. 06-5618. In those cases,[5] the Court is expected to give an authoritative account of what appellate review for "reasonableness" under 18 U.S.C. § 3742 means under *Booker*. In its

[5] It was revealed on May 31, 2007, that Claiborne, having fully served the sentence which the Eighth Circuit reversed as too short, was killed while trying to stop a friend from stealing a truck. His petition may be moot. At least the *Rita* case will still be decided, however, and will shed light on the weight to which the Guidelines are entitled and the standard of review in such cases as that one and this, where, as in *Rita*, a sentence inside the Guidelines was imposed.

forthcoming decision, the Court will likely provide substantial guidance as well as to how a *district* court should proceed at sentencing to comply with 18 U.S.C. § 3553(a), the law which governs federal sentencing (to the exclusion of the now-stricken § 3553(b)) after *Booker*. The instant petition should be disposed of in light of that decision.

Instead of complying with that Congressional mandate of § 3553(a), the sentencing court in this case, with the subsequent, unqualified endorsement of the court of appeals, announced its own intention to follow the Guidelines in all but unspecified exceptional cases. The lower court asserted that to sentence in accord with § 3553(a) "would be ignoring what the elected representatives of the United States citizens have strongly encouraged and what I think to be wise and good public policy, which is a fair degree of predictability and consistency in sentencing across the country." CA3 2App. 122. "I look to the direction of the Federal Sentencing Guidelines .... I believe that [the] guideline range is the thing that I should be looking to primarily," the sentencing court opined. CA3 2App. 121-22. These comments reflected judicial lawmaking based on a policy preference in opposition to the controlling statute.

Examination of the remaining, unexcised provisions of the Sentencing Reform Act discloses the key provision which remains mandatory post-severance: the district court's duty to impose ("The court *shall* impose ...") a sentence which is "sufficient" in the case at hand, without being "greater than necessary," to achieve four articulated objectives. These Congressionally defined purposes are: (A) "just punishment" in light of "the

seriousness of the offense"; (B) "deterrence," both general (deterrence of others) and specific (of the defendant); (C) incapacitation "to protect the public"; and (D) any "needed" rehabilitation and "correctional treatment" of the offender. 18 U.S.C. § 3553(a)(2). Before choosing that sentence, it is also mandatory under the Act that the sentencing court "consider" a number of factors. One, but only one, of those factors is the guideline range, referenced in subsection (a)(4). Nothing in the statutory language or structure makes subsection (a)(4) either a starting point or a presumptive ending point for the sentencing decision.

The compulsory, introductory clause of § 3553(a) (the overriding "principle of parsimony") has often been neglected in the post-*Booker* case law. Contrary to the actions of the courts below and those of most other Circuits, that controlling language has been overlooked more often than not. But courts are not entitled to dispute the existence or significance of statutory commands on grounds of policy preference. See *Jones v. United States*, 529 U.S. 848, 857 (2000); *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994) (criminal statutes should not be construed so that any clause is rendered superfluous). The affirmance of the resulting judgment, all too typical of the circuits' post-*Booker* decisionmaking, was thus a serious error of law requiring this Court's attention.

1. The court below asserts that the sentencing judge merely "relied on the guidelines as 'a natural starting point,'" which still giving "'meaningful consideration' to the other section 3553(a) factors." Appx. A, at 7. To bolster this conclusion, the panel states that the

district court also considered petitioner's "lengthy criminal history," as well as "the need to avoid sentencing disparities among defendants with similar records found guilty of similar misconduct," including the sentences meted out to his co-defendants. *Id.* Yet criminal history is one axis of the guideline range itself, not something different from it. And the only consideration the district court gave to the disparity issue was by way of justifying its refusal to deviate from the guidelines.

What the court below means by "starting point," to the extent that it reflects anything the district court actually said, is a place to start thinking about the proper sentence. From this point, however, the question naturally becomes whether there is any reason not to impose a sentence within the range. For all practical purposes, that is a presumption, albeit a rebuttable one. A judge-made, mandatory, rebuttable presumption of this kind violates *Sandstrom v. Montana*, 442 U.S. 510 (1979). As the first part of the *Booker* opinion recognizes, each guideline range functions as a statutory maximum until and unless another fact is found to increase that range. See *Blakely v. Washington*, 542 U.S. 296 (2004), applying *Apprendi v. New Jersey*, 530 U.S. 466 (2000); see also *Cunningham v. California*, 549 U.S. -- (2007). The process of calculating a guideline range is therefore unconstitutional if use of the guidelines is mandatory, raising a significant question about its validity if made presumptive.

Only if the burden of proof at sentencing for facts which raise the top of a guideline range were elevated to "beyond a reasonable doubt" could a presumption for

guideline sentencing survive constitutional scrutiny. See *Ulster County Court v. Allen*, 442 U.S. 140 (1979). Yet the court below, like the other circuits, has adhered to the view that the standard of proof under the guidelines for sentencing facts continues to be preponderance of the evidence. *United States v. Grier*, 475 F.3d 556 (3d Cir. 2007) (en banc). If a guideline sentence is treated as presumptive, even if that presumption is rebuttable, then the saving function of *Booker*'s remedial decision has been defeated and the sentencing process regains the unconstitutional nature it had before 18 U.S.C. § 3553(b) was stricken. Thus, the Fifth and Sixth Amendment "dangers" which Justice Breyer's opinion was thought to have "averted" are, indeed, made "recrudescent." It follows that a presumption, even if relatively easily rebutted, cannot be employed in the district court. *United States v. Zavala*, 443 F.3d 1165, 1170 (9th Cir. 2006) (per curiam), *opinion vacated upon grant of rehearing en banc*, 462 F.2d 1066 (2006) (per curiam) (being held pending decision in *Rita*).

That constitutional question need not be reached, however. The Sentencing Reform Act, once § 3553(b) has been excised, does not elevate the guideline range in any way over the other factors. The Act does not in any substantive sense make the range a "starting point." To do so is nothing but judicial legislation favoring the guidelines for policy reasons not found in the statute itself. This Court's guidance is required to correct the pervasive post-*Booker* error afflicting the Circuits.

2. The precedential opinion of the Third Circuit in this case also holds that a district court ordinarily must blind itself to current facts concerning the

defendant at a resentencing, if those facts -- here, post-sentence rehabilitation -- did not exist at the time of the original sentencing. Appx. A, at 7-8. Problems with this holding could be largely avoided, however, by recognizing, in any review of this case, that the issue addressed was not raised as a ground for reversal in petitioner's brief as appellant below.

In its introduction to the decision in petitioner's case, the panel accurately recites the three arguments raised in the appellant's opening brief. Appx. A, at 3. Indeed, these form the three lettered section headings for the opinion. Yet at headnote 3, the panel asserts that "Lloyd also argues that the district court erred in failing to consider his post-sentence rehabilitation efforts." Appx. A, at 7. The panel then proceeds to analyze this "argu[ment]," utilizing a plain error analysis. Yet in fact the district court's treatment of petitioner's post-offense rehabilitation was not raised as a separate ground for reversal, and so was not subject to a separate standard of review. Rather, the district court's remarks about petitioner's remarkable personal progress were cited as evidence in the record of its excessive reliance on the terms of the Guidelines Manual.

The cited comments of the sentencing court may or may not tend to prove the point for which petitioner cited them below, but for the panel to turn that passing reliance into an asserted ground for reversal and then announce Circuit precedent rejecting it was highly inappropriate as a matter of appellate jurisprudence.

In any event, the decision below is wrong. There is no rule of law -- statutory or judge-made -- that bars a district judge, post-*Booker*, from considering a defen-

dant's post-sentence rehabilitation or any other facts which may exist at the time of resentencing.[6]

At a post-*Booker* sentencing or resentencing, the district court is obligated to "consider" -- but is not bound by -- Sentencing Commission Policy Statements, 18 U.S.C. § 3553(a)(5), such as USSG § 5K2.19 (p.s.). Yet the district court in this case stated, or at least suggested, that it believed it *was* so bound. The limitations at a resentencing on remand are explicitly stated in a binding statute, however, which the court below never cited. That subsection states:

> A district court to which a case is remanded pursuant to subsection (f)(1) [sentence imposed in violation of law] or (f)(2) [incorrect application of sentencing guidelines] shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that --
>
> (1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission ... and that were in effect on the date of the previous sentencing ....

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[6] The Third Circuit relied for its holding on this point on case law from other circuits discussing the parameters of post-*Booker* remands of a sort that did not occur here, and which do not exist within the Third Circuit (that is, remands in which the district court is asked to opine on whether it had committed plain error in an initial pre-*Booker* sentencing). The authority cited was thus inapt.

(2) The court shall not impose a sentence outside the applicable guideline range except [under specified circumstances] ....

18 U.S.C. § 3742(g).[7] By thus stating expressly and in detail what a district court, in resentencing on remand, must and must not do -- and in subsection (g)(1) specifying a particular matter (and no other) that is to be considered as it existed at the time of the original sentencing -- Congress precluded the judicial inference of another such rule not found in the statute, such as that announced by the court below. "Expressio unius est exclusio alterius." See *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168-69 (2003); *Leatherman v. Tarant County Narcotics Intell. & Coord. Unit*, 507 U.S. 163, 168 (1993); see also *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991), quoting *Russello v. United States*, 464 U.S. 16, 23 (1983).

Moreover, the judicially-created rule announced in this case violated two other controlling federal statutes: 21 U.S.C. § 850[8] and 18 U.S.C. § 3661 ("No limitation

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[7] The term "apply" as used in § 3742(g)(1) must of course be understood, after *Booker*, to mean "consider." And nothing in § 3742(g)(2) could validly be applied to preclude the imposition of a below-Guidelines sentence, either under *Booker* or for several additional statutory and constitutional reasons not presented in this case at this time.

[8] "Except as otherwise provided in this subchapter or section 242a of title 42, no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purposes of imposing an appropriate sentence under this subchapter or subchapter II of this chapter."

shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purposes of imposing an appropriate sentence."). Neither of these laws was cited in the decision, however.

The further suggestion of the court below that it would be somehow unfair to allow defendants who win a resentencing the opportunity to have a full consideration of the actual, current facts of their cases, when others who did not appeal, or who appealed unsuccessfully, have no such opportunity, Appx. A, at 9, carries no force at all. Any successful appellant has the opportunity to do better than the litigant who didn't appeal or who lost an appeal. This is the inevitable consequence of the appeals system, and suggests no legitimate basis for complaint. See, *e.g.*, *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981).

Accordingly, this case presents aspects of the post-*Booker* sentencing landscape which warrant this Court's attention either in conjunction with or in the wake of the pending decison in *Rita*.

3. The decision below expresses confusion with respect to petitioner's argument on the district court's failure to state adequate reasons for its sentence. Appx. A, at 12 n.7. The argument made below, however, should not have been difficult to apprehend: "The court below failed to give a specific, meaningful reason for sentencing at the bottom of a guideline range which spans more than 24 months *and not any lower*." Aplt. Br. 24 (emphasis added). It is true that 18 U.S.C. § 3553(c)(1), as written, only requires a pinpoint expla-

nation of the sentence in terms of the "particular point within the range."[9] In relation to § 3553(a) after the demise of § 3553(b), that necessarily means a statement of why, in the court's view, no lower sentence would be "sufficient."

Section 3553(c)(1), as written, has the effect, after *Booker*, of encouraging and shielding Guideline sentences in the same way as the former 18 U.S.C. § 3742(e), and so must be severed from the Act under *Booker* just as was § 3742(e), which contained the differing standards of appellate review. That the Court did not say so in the *Booker* opinion only shows that the issue was not raised there. To put a floor under the sentencing court's obligation to state this kind of specific reason for the sentence, as § 3553(c)(1) attempts to do, is to favor within-Guideline sentences over non-Guideline terms in just the way that led this Court to strike down not only § 3553(b) itself but also § 3742(e).

A statement that the sentence falls within the range is no longer properly to be considered a "reason" at all. To the contrary, in light of the *Booker* opinion, which elevated the parsimony directive of 18 U.S.C. § 3553(a) to the level of controlling statutory mandate, the statutory requirement for the sentencing court to give a "specific reason" for its judgment has to mean, at the least, a reason attempting to explain why no lower sentence would be "sufficient" to accomplish the purposes of sentencing set forth under *id.*(a)(2), even if it does not reference all the other pertinent § 3553(a) factors. Anything else is not really a reason "for imposing [that] sentence." 18 U.S.C. § 3553(c)(1).

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[9] *See* Statutes Involved, *ante*.

Without the guidelines as a sufficient touchstone, a fully articulated reason for the sentence, particularly in the case of longer sentences,[10] is all the more important. In this way as well, the district court did not carry out its statutory obligations at the resentencing correctly and did not select, or attempt to explain that it had selected, a sentence on the basis that that particular punishment was both "sufficient" and "not greater than necessary." The affirmance of that judgment cannot be squared with a proper understanding of this Court's decision in *Booker*.

This petition should be granted and then disposed of as seems appropriate in light of the pending decision in *Rita v. United States*.

CONCLUSION

For the foregoing reasons, petitioner ERIC LLOYD prays that this Court grant his petition for a writ of certiorari, and reverse the judgment of the United States Court of Appeals for the Third Circuit affirming his sentence.

Respectfully submitted,

PETER GOLDBERGER
Counsel of Record
Attorney for Petitioner

June 2, 2007.

[10] Longer sentences correlate with cases where the guideline range exceeds 24 months in span. This is why the 24-month rule retains high importance even after *Booker*.

APPENDIX A

469 F.3d 319

United States Court of Appeals, Third Circuit.

UNITED STATES of America

v.

Eric LLOYD a/k/a Calvin Larue a/k/a Butter

Eric Floyd, Appellant.

No. 05-4241.

Submitted under Third Circuit LAR 34.1(a)

Nov. 9, 2006.

Filed Nov. 28, 2006.

Background: Defendant was convicted in the United States District Court for the District of Delaware, Jordan, J., of narcotics trafficking conspiracy. Following remand for resentencing in light of *United States v. Booker*, the District Court imposed same sentence, at bottom of Sentencing Guidelines range. Defendant appealed.

Holdings: The Court of Appeals, Greenberg, Circuit Judge, held that:

(1) District Court, on *Booker* remand, did not place too much emphasis on advisory Guidelines;

(2) District Court did not plainly err by refusing to consider defendant's post-conviction rehabilitation efforts;

(3) District Court gave sufficiently concrete explanation for imposing sentence that it did; and

(4) sentence was reasonable.

Affirmed.

***320** Peter Goldberger, Ardmore, PA, Attorney for Appellant.

Colm F. Connolly, United States Attorney Richard G. Andrews, First Assistant ***321** U.S. Attorney, Wilmington, DE, Attorneys for Appellee.

Before SLOVITER, CHAGARES, and GREENBERG, Circuit Judges.

GREENBERG, Circuit Judge.

I. INTRODUCTION

This matter comes on before the court on Eric Lloyd's appeal from a judgment of conviction and sentence entered August 23, 2005, based on his plea of guilty to a count in a superseding indictment charging him with conspiracy to possess with intent to distribute more than 500 grams of cocaine in violation of 21 U.S.C. § 846. The appeal raises issues limited to his resentencing after our remand for that purpose in light of *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), pursuant to which the sentencing guidelines now are advisory. The district court prior to *Booker* sentenced Lloyd at the bottom of the applicable sentencing guideline range of 168 to 210 months to a 168-month custodial term to be followed by a 5- year term of supervised release. After our remand following *Booker*, the district court, which did not change its calculation of the sentencing range, again sentenced Lloyd to an 168-month custodial term to be followed by a 5-year term of supervised release.

[1] The district court had jurisdiction under 18 U.S.C. § 3231 and we have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). *See United States v. Giaquinto*, 441 F.3d 195, 197 (3d Cir.2006); *United States v. Cooper*, 437 F.3d 324, 327-28 (3d Cir.2006). In adjudicating this appeal we recognize that, in general, a court of appeals gives deference to a district court's sentencing determinations and thus reviews sentences on an abuse of discretion basis. *Id.* at 330-32. But to the extent that this appeal involves contentions that the district court made mistakes of law, our review is plenary. *See Gibbs v. Cross*, 160 F.3d 962, 964 (3d Cir.1998). Nevertheless, insofar as Lloyd is advancing contentions that he did not preserve in the district court, our review is confined by the exacting plain error standards. *See*

United States v. Merlino, 349 F.3d 144, 161 (3d Cir.2003).

Lloyd advances three contentions on this appeal. First, he contends that the district court erred as he regards it as having established a presumptively correct range of reasonable sentences based on the sentencing guidelines rather than having treated the guidelines as being only one of several factors under 18 U.S.C. § 3553(a) for a court to consider before imposing sentence. Second, he contends that the court failed to offer a meaningful rationale for concluding that a sentence within the now advisory guidelines was the least sufficient sentence to achieve the purposes of punishment. Third, he contends that it was not reasonable for the court to determine that the sentence it imposed, though within the guidelines, was the least sentence sufficient to satisfy the purposes of punishment.

II. DISCUSSION

A. *The district court did not place too much weight on the advisory sentencing guidelines.*

[2] Lloyd argues that the district court "imposed sentence under a fundamental misapprehension of the statutory framework which governs after [*Booker*]." Appellant's br. at 10. In this regard he contends that the court ignored *Booker* and instead "announced its own intention to follow the guidelines in all but unspecified exceptional cases." *Id.* at 12. He believes that the court was wrong as post-*Booker* "the guideline range is but one of numerous ***322** factors to be 'considered,' and that the Act plainly states that the range is to be treated as inherently neither more or less significant than any other factor." *Id.* at 13.

In particular, he takes issue with the district court's following statements:

> And if I were to say, as your attorney is encouraging me, 'you know what, under [18 U.S.C. §] 3553, that feels too

harsh to me, I'm just not going to pay any attention to that guideline range,' I would be ignoring what the elected representatives of the United States citizens have strongly encouraged and what I think to be wise and good public policy, which is a fair degree of predictability and consistency in sentencing across the country.... So I believe that guideline range is the thing that I should be looking to primarily.

Id. at 12; [FN1] app. at 122.

> FN1. In his brief Lloyd does not quote all of the district court's remarks that we set forth at this point but we expand on the quoted remarks in the brief for purposes of clarity.

After our review of the matter we are satisfied that Lloyd's select extraction from the district court's remarks does not reflect fairly on what the court said. Rather, read as a whole and in context, these statements take on a different meaning. Accordingly, we quote them at greater length:

I don't feel, as your attorney has said, shackled by the guidelines and I'm going to give you the sentence I gave you before because the guidelines I view as deserving great weight in my consideration.

....

... I look to the direction of the Federal Sentencing Guidelines which do represent an effort by the United States Government to avoid sentencing disparity across the nation.... And if I were to say, as your attorney is encouraging me, 'you know what, under [18 U.S.C. §] 3553, that feels too harsh to me, I'm just not going to pay any attention to that guideline range,' I would be ignoring what the elected representatives of the United States citizens have strongly encouraged and what I think to be wise and good public policy, which is a fair degree of predictability and consistency in sentencing across the country. So I don't view the guidelines as shackling me, I view them as allowing me to be fair and consistent with

other judges who have the unhappy responsibility of sentencing.

So I believe that guideline range is the thing that I should be looking to primarily. I looked at the other factors under [section] 3553(a). I've examined them and think that they are not inconsistent with the sentence that you received. I won't go into things that we talked about at the first sentencing. Suffice it to say that your criminal history for [a] relatively young man is significant and clearly played a role here.

I reject the assertion that the sentence given to you is out of keeping with what the codefendants got. On the contrary, for each of your codefendants, as with you, I paid careful attention to what the criminal history and the offense level was and sentenced them as I thought appropriate in light of all the factors that were in play in each of their cases.

....

The Court has considered the defendant's arguments regarding sentencing and has considered [the] United States Supreme Court's decision in *Booker* ***323** which ruled [the] sentencing guidelines are now advisory. The Court also believes the sentence which is within the advisory guidelines range ... meets the sentencing goals outlined in Title 18, United States Code, Section 3553.

App. at 121-25. [FN2]

FN2. There were two other defendants in this case, Albari Malik Johnson, who pleaded not guilty and was convicted of conspiracy to possess with intent to distribute an unspecified amount of cocaine, and Ernest Morris, who pleaded guilty to offenses arising out of the conspiracy. The court imposed a below-guideline custodial sentence of 180 months to be followed by a 10-year term of supervised release on Morris pursuant to a government substantial-assistance motion. The court sentenced Johnson, who had a criminal history category of I and had a less significant role in the conspiracy than Lloyd, to a 121-month custodial term to be followed by a 3- year term of supervised release.

Whether we consider the district court's view of the role of the sentencing guidelines from a plenary approach or under an abuse of discretion standard, we cannot say that the court erred in applying *Booker.* In fact, the court's remarks are entirely consistent with our opinion in *Cooper* in which we discussed the function of the sentencing judge after *Booker* and, in particular, the role of the guidelines in relation to the other 18 U.S.C. § 3553(a) sentencing factors. In *Cooper* we held that the district court must give "meaningful consideration" to the section 3553(a) factors, [FN3] but the court need not "discuss and make findings of each of the § 3553(a) factors if the record makes clear the court took the factors into account in sentencing." *Id.* at 329. As to the function of the guidelines, in *Cooper* we stated:

> FN3. The section 3553(a) factors are:
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> the need for the sentence imposed--
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational and vocational training, medical care, or other correctional treatment in the most effective manner;
> (3) the kinds of sentences available;
> (4) the kinds of sentence and the sentencing range established for ... the applicable category of offense committed by the applicable category of defendants as set forth in the guidelines ...;
> (5) any pertinent policy statement issued by the Sentencing Commission;
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
> (7) the need to provide restitution to any victims of the offense.

The advisory guidelines range is itself one of the § 3553(a) factors, 18 U.S.C. § 3553(a)(4), and continues to play an

integral part in sentencing decisions. In *Booker,* the Court explicitly directed district courts to continue to 'take account of the Guidelines together with other sentencing goals. The Guidelines remain an essential tool in creating a fair and uniform sentencing regime across the country,' and provide a natural starting point for the determination of the appropriate level of punishment for criminal conduct. The § 3553(a) factors were intended to guide the Sentencing Commission in its formulation of sentencing guidelines.

Id. at 331 (citations and footnotes omitted).

The district court's remarks at sentencing in this case were consistent with our holding in *Cooper.* In this case the court relied on the guidelines as "a natural starting point" and gave "meaningful consideration" to the other section 3553(a) factors. ***324** In particular, the court at the resentencing considered more factors than the guidelines in crafting Lloyd's sentence as it also took into account the other section 3553(a) considerations including his lengthy criminal history, the sentences of the other defendants, and the need to avoid sentencing disparities among defendants with similar records found guilty of similar misconduct. In this exercise, it did not abuse its discretion.

[3] Lloyd also argues that the district court erred in failing to consider his post-sentence rehabilitation efforts. But his attorney in the district court did not object at sentencing to the court's approach with respect to his post-sentence rehabilitation efforts and, thus, we could grant relief by reason of the district court's treatment of those efforts only if we found plain error.

U.S.S.G. § 5K2.19 (Policy Statement) states, "Post-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when resentencing the

defendant for that offense." Under *Booker*, it is entirely appropriate for a court to consider pertinent policy statements. *See* 18 U.S.C. § 3553(a)(5). Lloyd nevertheless contends that section 5K2.19 no longer has prohibitive force so that, in this case, the district court should have given more consideration than it did to his post-sentencing rehabilitation efforts. In this regard the court stated,

> I have one final comment for you, Mr. Lloyd. I have listened carefully and paid attention to information provided to me by your attorney about your postconviction rehabilitative efforts. It's true that the sentencing guidelines direct me not to make that a factor in reducing the sentence that you're going to face but I hope you continue on the path you have chosen. Regardless of what I say or anybody else says or does, your life is your own, sir, and you do yourself the most good by continuing on in your effort to make the most of your opportunities.

App. at 126-27.

We see no plain error or indeed any error at law in what the court did. Though section 5K2.19, as part of the guidelines as a whole, is now advisory, nevertheless it would be an unusual case in which a defendant's post-sentence rehabilitation efforts following a *Booker* remand should impact on the sentence. After all, by definition those circumstances did not exist at the time of the original sentence. In *United States v. Worley*, 453 F.3d 706 (6th Cir.2006), the Court of Appeals for the Sixth Circuit looked at this specific issue and held:

> [I]n a *Booker* remand ... the conduct or circumstances that bear on the § 3553(a) factors must have been in existence at the time the original sentence was imposed. In [the case under review], the § 3553(a) factors raised by the defendants all involved matters occurring after the date of sentencing. The goal of the [*Booker*] remand is to determine if, at the time of sentencing, the district judge would have imposed a different sentence in the absence of

mandatory guidelines. Post-sentencing events or conduct simply are not relevant to that inquiry.

Id. at 709 (quoting *United States v. Re*, 419 F.3d 582, 584 (7th Cir.2005)). Both the Courts of Appeals for the Sixth and Seventh Circuits have concluded that "given the limited nature of the remand, the defendant's post-sentencing efforts while incarcerated were not relevant...." *Worley*, 453 F.3d at 709; *see also Re*, 419 F.3d at 583-84.

***325** [4] We essentially agree with these courts, though we would not hold that a court never could consider a defendant's post-sentencing rehabilitation efforts when resentencing. In this regard we point out that *Booker* surely impacted on the mandatory nature of section 5K2.19, even though it has not changed the usual practical impact of that section at a *Booker* resentencing. Yet our opening for consideration of post-sentencing rehabilitation efforts is narrow for we reiterate our view that a court, except in unusual cases, should consider only conduct and circumstances in existence at the time of the original sentencing when it resentences following a *Booker* remand. After all, an approach permitting a defendant's post-sentencing rehabilitation efforts to impact on a resentence "would unfairly disadvantage defendants who were ineligible for re-sentencing and therefore had no opportunity to bring their rehabilitative efforts before the sentencing court." *United States v. Hertzog*, 186 Fed.Appx. 314, 317 (3d Cir.2006). [FN4] In this case we are unaware of any circumstance that could satisfy the exacting standard that we have set to justify a court in considering post-sentencing rehabilitation efforts following a *Booker* resentencing. [FN5]

FN4. We realize that *Hertzog* was a not precedential opinion but we quote that opinion because we are adopting its language as our own rather than as a precedent. In fact, in *Hertzog* we used the language we now quote in characterizing the district court's remarks at the resentencing. Significantly, the district court in *Hertzog* recognized that it had discretion to grant a departure for

> the defendant's post-sentencing rehabilitation efforts, an approach with which we agree though it should exercise its discretion to consider post-sentencing rehabilitation efforts sparingly.
>
> FN5. We do not address the propriety of considering post-sentencing rehabilitation efforts at a resentencing other than in a *Booker* context, though we observe that section 5K2.19 by its terms is not confined to *Booker* resentencings.

B. *The district court gave sufficient reasons for not sentencing Lloyd below the guideline range.*

[5] Under 18 U.S.C. § 3553(c)(1), a district court is obligated to state in open court "the reasons for imposing a sentence at a particular point within [a guidelines sentencing] range" exceeding 24 months. That section obligates a district court to "give concrete reasons" for its sentence. *United States v. Gricco*, 277 F.3d 339, 363 (3d Cir.2002).

Prior to *Booker*, we held that a court's failure to comply with this requirement was harmless if it sentenced the defendant at the bottom of the guidelines range as the defendant received the lightest possible sentence, absent a departure. *Id.* at 363 n. 15. Lloyd contends that now that the guidelines are merely advisory, a sentence at the bottom of the range is not the least possible sentence and, accordingly, a court's failure to comply with section 3553(c)(1) is not harmless. Therefore, Lloyd argues that the district court must comply with the requirement to state its reasoning in all sentencings where the guidelines range exceeds 24 months, even in cases where the sentence is at the bottom of the guidelines range. Lloyd did not advance this contention in the district court.

Even assuming that Lloyd is correct that a violation of section 3553(c)(1) is no longer necessarily harmless if the court sentences the defendant at the bottom of the guidelines range, in this case the court was in compliance with any

requirement, if there was one, that it state its reasoning for imposing the sentence at a particular point within the applicable range and the fact that it did not give a fuller explanation certainly could not rise to the level of plain ***326** error or, indeed, any error at all. [FN6] In reaching this conclusion we recognize that, of course, it is always possible for a court to say more at a sentencing than it does. Yet a court can provide "concrete reasons" for its sentence without speaking at great length and the court did so here. After all, among other things, it stated that Lloyd's "criminal history for [a] relatively young man is significant and clearly played a role here," and observed that the sentence was in proportion to the sentences of the two co-defendants. App. at 123. Moreover, the court referred to the original sentencing, in which it said:

> I want to make it clear that I don't believe that you're simply a misguided youth at this point in your life. You appear, from the evidence that I've seen, to be a sophisticated businessman ..., but who has chosen as his stock and trade the poison of drugs, which are a curse on society and which, in supreme irony, inflict upon others the very circumstances that have been so terribly detrimental in your own life.
>
> That's not lost on me at all. And the poison that you were instrumental in bringing into this community may very well be--indeed, it's almost certain to be producing another boy whose mother or father will die early, who will beat and abuse them because of drug abuse, and who will, in turn, have their life wrecked.

App. at 5-6. Plainly the court satisfied its obligation to provide "concrete reasons" for the sentence, which included Lloyd's criminal record, the co-defendants' sentences, and the danger of Lloyd's crime to society. Indeed, we believe that ordinarily a court when fully explaining its sentence will satisfy section 3553(c)(1) even without mentioning that

section. In the circumstances, we repeat that the court did not commit plain error or any error at all under section 3553(c)(1). [FN7]

> FN6. We have explained the application of the plain error standard as follows: "Thus, for this Court to grant the relief the defendant[ ] seek [s], the District Court must have committed plain error that prejudiced them. Even where error and prejudice are found, we will only exercise our discretion to correct the error if it 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' " *Merlino*, 349 F.3d at 161 (citations omitted).
>
> FN7. Lloyd's positions on this appeal seem to be inconsistent. First he argues that the guidelines are merely one factor among numerous considerations of equal weight in the sentence. Then he contends that section 3553(c)(1) has an enhanced significance after *Booker*, though it might be expected that his contention on the second point in view of his first point should be exactly contrary to the one he takes.

C. *The sentence was reasonable.*

Lloyd argues that the 168-month sentence, though at the bottom of the guidelines range, was unreasonable because it was greater than necessary to accomplish the goals of criminal punishment and a lesser penalty would have been sufficient. He argues that the sentence was unreasonable because: he was only 26 years old at the time of resentencing; he has three children; he did not know his father; his mother was a drug addict who died when he was 17; he accumulated nine criminal history points by age 18; he left high school after the tenth grade; he was a drug abuser; he made significant efforts at self-improvement while in prison; and he has loving friends and family. Lloyd asserts that "[a]ny 'reasonable' sentencing decision would have to take into account these objective indicators of a substantial need for and likelihood to benefit from rehabilitation, following a rocky start in very difficult

circumstances." Appellant's br. at 34-35.

***327** In *Booker* "the Supreme Court directed appellate courts to review sentences for reasonableness...." *Cooper*, 437 F.3d at 326. In *Cooper* we described the sentencing court's obligations and the contours of an appellate court's review:

> To determine if the court acted reasonably in imposing the resulting sentence, we must first be satisfied the court exercised its discretion by considering the relevant [§ 3553(a)] factors .... The record must demonstrate the trial court gave meaningful consideration to the § 3553(a) factors. The court need not discuss every argument made by a litigant if an argument is clearly without merit. Nor must a court discuss and make findings of each of the § 3553(a) factors if the record makes clear the court took the factors into account in sentencing....
>
> ....
>
> [6][7] In addition to ensuring a trial court considered the § 3553(a) factors, we must also ascertain whether those factors were reasonably applied to the circumstances of the case. In doing so, we apply a deferential standard, the trial court being in the best position to determine the appropriate sentence in light of the particular circumstances of the case. Under such circumstances, deference should be given. As the Court of Appeals for the Seventh Circuit recently held,
>
> > [t]he question is not how we ourselves would have resolved the factors identified as relevant by section 3553(a) ... nor what sentence we ourselves ultimately might have decided to impose on the defendant. We are not sentencing judges. Rather, what we must decide is whether the district judge imposed the sentence he or she did for reasons that are logical and consistent with the factors set forth in section 3553(a).
>
> While we review for reasonableness whether a sentence lies within or outside the applicable guidelines range, it is less likely that a within-guidelines sentence, as opposed to

an outside-guidelines sentence, will be unreasonable.

...

Although a within-guidelines range sentence is more likely to be reasonable than one that lies outside the advisory guidelines range, a within-guidelines range is not necessarily reasonable *per se.* Otherwise, as several Courts of Appeals have concluded, we would come close to restoring the mandatory nature of the guidelines excised in *Booker.* Nor do we find it necessary ... to adopt a rebuttable presumption of reasonable for within-guidelines sentences....

To sum up, appellants have the burden of demonstrating unreasonableness. A sentence that falls within the guidelines range is more likely to be reasonable than one outside the guidelines range. There are no magic words that a district judge must invoke when sentencing, but the record should demonstrate that the court considered the § 3553(a) factors and any sentencing grounds properly raised by the parties which have recognized legal merit and factual support in the record.

Id. at 329-32 (citations and footnotes omitted).

[8] Lloyd has not satisfied his burden of proving that the 168-month sentence followed by a 5-year term of supervised release was unreasonable. The sentence was at the bottom of the guideline range and thus, in the words of *Cooper,* was "more likely to be reasonable that one outside the guidelines range." The court gave "meaningful consideration" to the relevant section 3553(a) factors and "reasonably ***328** applied the factors to the circumstances of the case." *See United States v. Charles,* 467 F.3d 828, 2006 WL 3231396, at * 2 (3d Cir. Nov.9, 2006). Though the court considered Lloyd's life circumstances which he contends should have mitigated the sentence, the fact is that there is no denying Lloyd was involved in criminal conduct involving a substantial quantity of cocaine. [FN8] He has been living the life of a criminal since age 17, having been convicted of

numerous felonies and other offenses.

> FN8. Arguably Lloyd's criminal history suggests that a longer rather than shorter sentence than otherwise might have been appropriate should have been imposed. That view of a substantial criminal history surely is the more conventional approach than that which Lloyd takes. After all, under the sentencing guidelines the more aggravated a defendant's criminal history, the higher his sentencing range is likely to be.

III. CONCLUSION

For the foregoing reason the judgment of conviction and sentence entered August 23, 2005, will be affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

February 4, 2005
C-39

No. 04-1081

United States of America
v.
Eric Lloyd, Appellant
(Dist. Of Delaware No. 02-cr-00141-1)

Present: ALITO, McKEE and AMBRO, Circuit Judges

Unopposed Motion by Appellee, USA, to Remand this matter to the United States District Court for the District of Delaware for Re-sentencing in light of Booker and Fanfan.

/s/Lynn M. Lopez
Lynn M. Lopez
Case Manager (267) 299-4922

ORDER

The foregoing motion is granted.

By the Court,

/s/Samuel A. Alito, Jr.
Circuit Judge

Dated: March 17, 2005

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 05-4241

UNITED STATES OF AMERICA

v.

ERIC LLOYD
a/k/a
Calvin Larue
a/k/a
Butter,

Appellant

On Appeal from the United States District Court
for the District of Delaware
(D.C. Crim. No. 02-00141-1)
Honorable Kent Jordan, District Judge

Submitted under Third Circuit LAR 34.1(a)
November 9, 2006

SUR PETITION FOR REHEARING

BEFORE: SCIRICA, Chief Judge, and SLOVITER, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, and GREENBERG, Circuit Judges

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The petition for rehearing filed by appellant, Eric Lloyd, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied. Judge Greenberg's vote is limited to denying rehearing before the original panel.

BY THE COURT:

/s/ Morton I. Greenberg
Circuit Judge

DATED: 3 January 2007